Supreme Court, U.S.
FILED
JUN 19 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

October Term, 1985

NO. 85-1910

BUSINESS ELECTRONICS CORPORATION,
Petitioner,

v.

SHARP ELECTRONICS CORPORATION,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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ARGUMENT

Business Electronics Corporation ("BEC") asserts in its Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit ("Petition") that Supreme Court review is warranted because the United States Court of Appeals for the Fifth Circuit decided an important question of federal law which has not been, but should be, resolved by this Court.

The question submitted for review as phrased by BEC is not the one determined by the Court of Appeals. The question in fact resolved by the Court of Appeals was whether an agreement between a manufacturer and a dealer to terminate another dealer because of the latter's discount pricing constitutes a vertical price fixing agreement *per se* illegal under § 1 of the Sherman Act, 15 U.S.C. § 1, where

there is no claim of any agreement between the manufacturer and the remaining dealer to raise, maintain or otherwise fix resale prices. *Business Electronics Corp. v. Sharp Electronics Corp.*, 780 F.2d 1212, 1215-16 (5th Cir. 1986); *see* Appendix to Petition at pp. 6a-8a. The Court of Appeals correctly held that under *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752 (1984), the answer is no.

Respondent, Sharp Electronics Corporation,[1] respectfully submits that if any question presented by the Court of Appeals' decision is deemed appropriate for review by this Court, it cannot be reviewed without determining the larger, and dispositive, question of whether vertical price fixing agreements, however defined, should continue to be deemed *per se* illegal under § 1. Respondent has filed a Cross-Petition for Writ of Certiorari ("Cross-Petition") (No.) in which it has asked the Court to review this larger question, and, ultimately, to rule that all vertical restraints, including vertical price restraints, should be evaluated under the rule of reason. Such a decision by this Court would moot any issue raised by BEC's Petition herein.

[1] Pursuant to Rule 28.1 of the Supreme Court Rules, Sharp Electronics Corporation represents that its parent corporation is Sharp Corporation and that it has no subsidiaries or affiliates.

CONCLUSION

For the foregoing reasons, respondent respectfully requests that the Petition not be granted, unless this Court also determines to grant the Cross-Petition.

Dated: June 19, 1986

Respectfully submitted,

s/ PETER J. GARTLAND

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CERTIFICATE OF SERVICE

This is to certify that on the 19th day of June, 1986, three true and correct copies of the foregoing Brief in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit were served by mail on counsel of record for petitioner, Stephen D. Susman, Susman, Godfrey & McGowan, 2400 Allied Bank Plaza, Houston, Texas 77002.

s/ PETER J. GARTLAND

PETER J. GARTLAND